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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1824

WILLIAM JOHN MALLOW,
ROBERT ALLEN BARBEAU,
and
CHARLES EDWARD McCORD,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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WILLIAM JOHN MALLOW,
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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, WILLIAM JOHN MALLOW, ROBERT ALLEN BARBEAU and CHARLES EDWARD McCORD, respectfully pray a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 19, 1980.

CITATIONS TO OPINIONS BELOW

The United States District Court for the District of New Mexico entered a judgment of conviction as two counts, (21 U.S.C. §841; 21 U.S.C. §960), as to WILLIAM JOHN MALLOW, ROBERT ALLEN BARBEAU, and CHARLES EDWARD McCORD, Petitioners herein on October 18, 1978. These convictions were made the subject of Appeals to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed these convictions on February 19, 1980, in an unpublished opinion entitled *United States v. Mallow, et al,* No.'s 78-1953, 1954, 1955 (February 19, 1980), Judge Holloway dissenting in part. This Opinion is reproduced herein as Appendix A. The Petitioners subsequently filed a *Petition for Rehearing and Suggestion for Rehearing En Banc,* which was denied by the Tenth Circuit on April 16, 1980. This Order denying rehearing is reproduced herein as Appendix B. Subsequently, that Order was corrected by the Court on April 23, 1980, to reflect that Circuit Judge Holloway voted to grant rehearing. This correction is reproduced herein as Appendix C.

JURISDICTION

The judgment of the United States District Court was affirmed by the United States Court of Appeals, and the Petitioners' *Petition for Rehearing and Suggestion for Rehearing En Banc* on April 16, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22.

QUESTIONS PRESENTED

1. Whether a trial court can materially violate a stipulation of evidence between the United States and a criminal defendant and thereafter convict the defendant in a bench trial in spite of the fact that the defendant's waiver of jury trial was conditioned upon the violated stipulation.

2. Whether a trial court can reopen a criminal trial *sua sponte* after having accepted the case on stipulated facts.

3. Whether a trial court can *sua sponte* enforce those terms of a bargain between the United States and a criminal defendant which were favorable to the United States and refuse to enforce those terms of the bargain favorable to the criminal defendant.

4. Whether evidence that (1) undescribed individuals bearing the same last names as several criminal defendants were at the scene of a crime together with (2) general testimony that the "defendants" were arrested without qualification as to "which defendants", is sufficient to establish guilt beyond a reasonable doubt as to each specific criminal defendant in a multiple defendant criminal cause.

5. Whether evidence that a plane laden with contraband was first sighted over forty miles north

of the Mexican Border is sufficient to establish guilt of illegal importation beyond a reasonable doubt.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The United States Constitution, Amendment V reads in pertinent part:

   No person shall . . . be deprived of life, liberty, or property, without due process of law;

2. The United States Constitution, Amendment VI reads in pertinent part:

   In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

STATEMENT OF THE CASE

A. Course and Proceedings in the Court Below.

WILLIAM MALLOW, ROBERT BARBEAU and CHARLES McCORD, Petitioners herein and Co-Defendant John Montgomery, were jointly charged by an indictment filed on March 1, 1978, in the United States District Court for the District of New Mexico on two counts charging them with (1) possession of marijuana with intent to distribute, 21 U.S.C. §841(a)(1); and (2) importation of marijuana, 21 U.S.C. §960, (RI 1). Pursuant to the Petitioners' *Motion to Suppress*, (RI 51), the District Court, United States District Judge H. Vearle Payne presiding, held a suppression hearing on April 5th, 1978, (RII 1, et seq.).

Thereafter, the United States Attorney contacted all Defense Counsel urging that a stipulation and jury waiver be utilized in the case. The record also reveals that the District Court by letter approved this agreement and asked for closing briefs. (RI 1, et seq.). Petitioners Mallow and McCord waived Jury trials on August 7, 1978, such *Waiver* indicating that the Petitioners were amenable to allowing "the Court to determine their guilt or innocence based on evidence presented at said [suppression] hearing," (RI 66). The *Stipulations* had been previously signed by Counsel for Petitioners and Counsel for the United States to this effect on April 20, 1978, (RI 57). Counsel for the Petitioners below revealed to the District Court that their view of the *Waiver* and *Stipulation* was that the evidence at the suppression hearring and that evidence specifically stipulated to would be the *sole evidence* considered by the Court, (RII 120, 121, 132, 134, 136, 137). The District Court was clearly aware of their position.

> The Court: * * * Now Among themselves, they [Defendants and their counsel] sort of took the position that that's all the evidence there would be. (RII 120).

And the United States revealed that its view of the bargain was the same.

> Mr. Williams: We were under the impression, your Honor, that at the time that — the Court was going to reach a verdict on the basis of the [suppression] transcript. (RII 124).

In spite of the fact that the United States did not request reopening and seemed content with the agreement, the District Court upon receipt of closing briefs (RII 120, et seq.), took note of the identification deficiency, (RII 120-121), and the Court then *sua sponte* ordered a reopening of the case, (RII 121). New Mexico Counsel Ken Cullen acting as local counsel and appearing as sole counsel for all Defendants below advised the Court that his position would be "that the Court was prohibited from proceeding," (RI 121). Thereafter, on or about August 22nd, Petitioner Barbeau and Co-Defendant Montgomery filed a Motion for Writ of Prohibition and/or for Writ of Mandamus, with the Tenth Circuit Court of Appeals, (No. 78-1674), arguing that, *inter alia:*

> In [reopening, Judge Payne] violated the Stipulation of the parties and violates the parties' rights pursuant to the Sixth Amendment of the United States Constitution to have a trial by jury except where one has been waived intelligently and knowingly," *(Motion for Writ,* at p. 8).

This Writ was denied on August 24, 1978.

Thereafter, the contested reopening was held on September 11th, 1978, (RII 130). Petitioner Barbeau and Co-Defendant Montgomery appeared and objected to the reopening, (RII 132, 136); Petitioners Mallow, McCord and their Counsel, Lee Chagra declined to appear at all, (RII 131). Thereafter, all Defendants below, Mallow, Barbeau, McCord and Montgomery,

those present and not present, were convicted as to both counts of the indictment, (RII 152).

Subsequently, the Petitioners appealed to the United States Court of Appeals for the Tenth Circuit, pointing out: (1) the insufficiency or total lack of the evidence as to identification; (2) the insufficiency of the evidence as to importation; and (3) the reopening by the Court in contravention of the agreement reached between the parties, (see *Brief* of Appellant Barbeau, etcetera); and reiterated these three challenges to their convictions in a Joint (Barbeau, Mallow and McCord) Motion for Rehearing (see *Joint Petition for Rehearing and Suggestion for Rehearing En Banc).*

B. Statement of the Facts.

This case involved the following basic facts: (1) a plane was sighted some forty miles north of the Mexican border, (RII 43), and (2) followed by a Government plane to a landing strip, (RII 80-81); (3) the plane subsequently took off and again was followed. (4) Upon the plane's landing elsewhere the pilot was arrested, (RII 83-84). Three individuals, the petitioners herein, were subsequently arrested near the first landing site in a pickup laden with marijuana, (RII 92-95). The evidence at the suppression hearing was that four persons with the same last names as defendants, Mallow McCord, Barbeau and Montgomery, were involved (RII 81-82, 94-95) in the offenses charged, (see Slip Opinion *Mallow, Infra.*, Appendix A); and that the officer testified that he arrested "the Defendants" without specifying which or what number of Defendants he arrested, (RII 102-103), (see Slip Opinion, *Mallow, Infra.*, at Appendix A).

Subsequently, at the reopening the United States was able to make a positive identification as to one Defendant, John Montgomery, (RII 139-140, 145-146, 150).

REASONS WHY THE WRIT SHOULD BE GRANTED

I

A Trial Court Cannot Materially Violate A Stipulation Of Evidence Between The United States And A Criminal Defendant And Thereafter Convict The Defendant In A Bench Trial In Spite Of The Fact That The Defendant's Waiver Of Jury Trial Was Conditioned Upon The Violated Stipulation.

This cause represents an unprecedented violation of a conditional jury waiver by a District Court which resulted in a denial of these Petitioners' Sixth Amendment rights. It is the Petitioners' position (1) that the jury waiver was expressly and implicitly conditioned upon the stipulation; (2) that the reopening violated the stipulation and waiver; and (3) that the Court was without authority to violate the stipulation and thereafter utilize the jury waiver.

A. *The Conditional Nature of the Jury Waiver.* The waiver speaks for itself. Petitioners Mallow and McCord waived Jury trials on August 7, 1978, such *Waiver* indicating that the Petitioners were amenable to allowing "the Court to determine their guilt or innocence

based on evidence presented at said [suppression] hearing," (RI 66). The *Stipulations* had been previously signed by Counsel for Petitioners and Counsel for the United States to this effect on April 20, 1978, (RI 57). Thus, a conditional jury waiver was made, conditional upon the limitation of evidence.

B. *The Reopening Violated the Stipulation and Waiver.* There is no question as to the intent of the parties here. Counsel for the Petitioners below revealed to the District Court that their view of the *Waiver* and *Stipulation* was that the evidence at the suppression hearing and that evidence specifically stipulated to would be the *sole evidence* considered by the Court, (RII 120, 121, 132, 134, 136, 137). The District Court was made clearly aware of the Petitioners' position.

> The Court: * * * Now Among themselves, they [Defendants and their counsel] sort of took the positior that that's all the evidence there would be. (RII 120).

And the United States revealed that its view of the bargain was the same.

> Mr. Williams: We were under the impression, your Honor, that at the time that — the Court was going to reach a verdict on the basis of the [suppression] transcript. (RII 124).

C. *The Lack of Authority to Proceed Under the Jury Waiver.* Having decided, *sua sponte,* to proceed with a

reopening, the District Court was without authority to utilize the Jury Waiver which was conditioned on the limitation of evidence envisioned in the stipulation. The Tenth Circuit writing on this point in *United States v. Mallow*, Slip Opinion, No.'s 78-1953, 1954, 1955 (February 19, 1980), Appendix A, *infra.*, pointed out that the Petitioners below did not withdraw their Jury Waivers upon learning that the Court was to reopen. This is true, Counsel for Petitioners below sought to enforce the stipulation and Jury Waiver as agreed by (1) informing the Court that in their opinion the Court was prohibited from proceeding; (2) petitioning for a writ of prohibition from the Tenth Circuit, *Writ*, No. 78-1674 (10 Cir. August 24, 1978); and (3) thereafter making further objections, (RII 136-137), or declining to appear with counsel; and upon appeal arguing that the evidence should only be the evidence stipulated to by the parties, (see *Briefs.*)

However, in any case, the Court was made aware several times of the conditional nature of the jury waiver, and that should have alerted the Court to the fact that jury waivers were no longer viable absent a reaffirmation on the part of the Defendants themselves.

As a matter of constitutional law, any jury waiver is to be carefully scrutinized, for the "courts indulge every reasonable presumption against a waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, (1938); citing, *Aetna v. Kennedy*, 301 U.S. 389, (1937). Where objections or exceptions are made by Counsel, a voluntary waiver of the jury right will

not be construed. *Kearny v. Case,* 12 Wall 275, (1870). This Court has established the constitutionality and viability of jury waivers which are less than absolute, but this Court has required the lower courts to unequivocably abide by any conditions. *Patton v. United States,* 281 U.S. 276, (1930). *Government of Canal Zone v. Davis,* 592 F.2d 887, 889 (5th Cir. 1979). Thus, the express, intelligent, and knowing consent required for a jury waiver under the circumstances (*Duncan v. Louisiana,* 391 U.S. 145, (1968); *Adams v. United States,* 317 U.S. 269, (1949)) were not met here.

In a similar Fourth Circuit precedent the Government sought to reopen a case submitted under stipulated facts coupled with a jury waiver, the District Court declared:

> . . . The Court has not been referred to and is unaware of any criminal case tried on stipulated facts in which such a motion to reopen has been granted. In considering such a motion, the Court must weigh the prejudice which would inure to the nonmoving party. In the instant case, it would appear that the prejudice would be substantial. The Defendant waived his right to trial by jury on the assumption that he would be tried on the known set of facts stipulated to by him and his counsel. *To grant the government's motion would be to impose upon the Defendant a risk he never reasonably anticipated in making his decision to waive a trial by jury.* (Emphasis Suppl' ') *United States v. Posner,* 408 F.Supp. 1145; aff'd 551 F.2d 310 (4th Cir.

1977); U.S. cert. denied, 434 U.S. 837, rehearing denied, 434 U.S. 960 (1977).

The instant waivers were expressly and implicitly conditioned on the very limitations on the evidence which were not honored by the Court. The responsibility of Petitioners' counsel was met by demonstrating to the Court the conditional nature of the waiver. (RII 120, 121, 136, 137). The Government acknowledged a similar view, (RII 124). The Court therefore acted improperly in failing to honor Petitioners' objections.

Also, the District Court breached an affirmative duty which has been placed on all courts to assure that the Petitioners' Constitutional rights were not violated in this regard. This duty was clearly expressed and defined by this Court in the *Patton* case:

> Before any waiver can become effective the consent of the government's counsel and the sanction of the Court must be had, in addition to the express and intelligent consent of the Defendant. *And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof,* and with a caution increasing in degree as the offense dealt with increases in severity [*Patton, Supra,* pp. 312-313]. (Emphasis Supplied)

The District Court here was well aware of the unique nature of the proceedings, and the conditional nature of the jury waiver, (RII 120), and thus should have acted *sua sponte* to protect the Petitioners' Sixth Amendment rights, not deny them.

II

A Trial Court Cannot Reopen A Criminal Trial *Sua Sponte* After Having Accepted The Case On Stipulated Facts.

The usual rule is that when a Court accepts a stipulation, the Court is bound by it. *Verkouteren v. District of Columbia*, 346 F.2d 842 (D.C. Cir. 1965); *Ruderman v. United States*, 355 F.2d 995 (2nd Cir. 1966); *Fenix v. Finch*, 436 F.2d 831 (8th Cir. 1971). In criminal cases, reopening to introduce additional evidence even without a stipulation or "agreed statement of facts" requires "the trial judge to exercise extreme care." *Henry v. United States*, 204 F.2d 817, 821 (6th Cir. 1953), here, where the case was submitted upon a *Stipulation* and a *Waiver* which involved the criminal defendant agreeing to a bench trial; stipulating to the chemical content of the alleged contraband and chain of custody; and allowing the use of otherwise inadmissible suppression hearing testimony, (RI 57, 66), it would appear that the Court was compelled not to violate the stipulation by reopening *sua sponte*.

Where convictions have flowed from the violation of the terms of a bargain in which the Defendant gave up important rights, reversal has usually followed

whether the Court or the State was the actual violator in the agreement. *Santabello v. New York*, 404 U.S. 257, (1971); *Workmen v. Commonwealth*, 580 S.W.2d 206, (Ky.S.Ct. 1979); *Butler v. State*, 228 So.2d 421 (Fla. App. 1969).

There are also serious problems about allowing a District Court to violate such an agreement purely in the interests of aiding the Government case against the Defendant, (RII 120, et seq.). "With rare exceptions the Federal Court is not authorized to act *sua sponte;* an adversarial interest is essential." *United States v. Weinstein*, 511 F.2d 622, 628 (2nd Cir. 1975). The Court's prosecutorial zeal here to reopen and cure what the Court perceived as a flaw in the government's case sets a dangerous precedent which cannot be permitted to stand (see *Querica v. United States*, 289 U.S. 466, 1933)). Such an agreement having been entered into "at arm's length" with neither party requesting relief therefrom, the trial court was bound to abide by its terms and render judgment without reopening.

III

A Trial Court Cannot *Sua Sponte* Enforce Those Terms Of A Bargain Between the United States And A Criminal Defendant Which Were Favorable To The United States And Refuse To Enforce Those Terms Of The Bargain Favorable To The Criminal Defendant.

Likewise, it was intolerable to enforce only the terms of the bargain which benefited the Government. The

bargain made was that the Petitioners would (1) waive a jury trial; (2) stipulate to a chemical analysis; (3) stipulate to a chain of custody; and (4) stipulate to the use of otherwise inadmissible suppression hearing testimony; and that the sole benefit inuring to them would be the limitation of evidence to those stipulated facts. The District Court struck out the single benefit to the Petitioners, but enforced the other provisions against the Petitioners. It would appear that this is an egregious violation of due process as well as a violation of the principle that our society keeps the bargains it makes with criminal defendants, *Santabello, Supra; Workmen, Supra; Butler, Supra.*

IV

Evidence That (1) Undescribed Individuals Bearing The Same Last Names As Several Criminal Defendants Were At The Scene Of A Crime Together With (2) General Testimony That The "Defendants" Were Arrested Without Qualification As To "Which Defendants", Is Insufficient To Establish Guilt Beyond A Reasonable Doubt As To Each Specific Criminal Defendant In A Multiple Defendant Criminal Cause.

The Tenth Circuit upheld the sufficiency of the identification evidence which was (1) the references to persons with identical last names being at the scene of the crime, (RII 94-95); the references to the "Defendants" being arrested, (RII 102-103); and subsequent formal

identification of Co-Defendant Montgomery as being one of the persons testified about,[1] (see *Mallow, Infra,* Appendix A).

Since the first description of the alleged participants in the offense was by last name only without the officier identifying or describing the specific individual, the identification must rest on the Defendants counsel's questions when he referred to the Defendants being arrested at the scene to which a simple "yes" was answered by the officer, (RII 102-103). This reference to "Defendants" was never connected to the earlier "last name" testimony by defense counsel or the Government. It is the Petitioners' position that a mere affirmative answer to references about the Defendants being present at the scene is insoluably ambiguous,[2] and clearly not proof beyond a reasonable doubt as required by law, *In Re Winship,* 397 U.S. 358 (1970).

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1 The Tenth Circuit conceded that Petitioners Mallow, McCord and Barbeau were never made the subject of "a typical in-court identification," *Mallow, Infra.,* Appendix A.

2 The ambiguity is more apparent when we consider that there were four Defendants in the courtroom at the time, MONTGOMERY, BARBEAU, McCORD, and MALLOW. When defense counsel asked questions about "Defendants" did he mean (1) MONTGOMERY, BARBEAU, McCORD, and MALLOW; (2) MONTGOMERY and BARBEAU; (3) MONTGOMERY and McCORD; (4) MONTGOMERY and MALLOW; (5) MONTGOMERY, BARBEAU and McCORD; (6) MONTGOMERY, BARBEAU, and MALLOW; (7) BARBEAU and McCORD; (8) BARBEAU and MALLOW; (9) BARBEAU, McCORD and MALLOW; or, just his clients, (10) McCORD and MALLOW; or (11) "Defendants" not present?

The Tenth Circuit, in upholding the sufficiency of the evidence below, placed itself in direct conflict with a prior decision of its circuit and prior decisions of other circuits. As the Tenth Circuit held in *Gravatt v. United States*, 260 F.2d 498, (10th Cir. 1958):

> It is, of course, Hornbook law that in criminal cases, the Government must prove the defendant guilty beyond a reasonable doubt, and that if the undisputed evidence is as consistent with innocence as with guilt, the Government has failed to make a case to go to the jury. It is common knowledge that in many instances men bear identical names. How then can it be said, without more, that Earl E. Gravatt who was convicted in the Oklahoma State Court in 1939 was one and the same person as Earl Elmer Gravatt on trial in this case. The middle initial "E" certainly bears some significance. It could have been Edgar or Edward, or some other name. It was not incumbent on the defendant to establish that he was not the same person as Earl E. Gravatt. That duty rested upon the Government. *Gravatt, Supra.*, at 499.

In our case, we do not even have the level of proof attempted in *Gravatt*. In addition to *Gravatt*, the Petitioners would refer this Court to the handling of this identification issue by the Third Circuit in *United States v. Keller*, 512 F.2d 182 (3rd Cir. 1975); and by the Fifth Circuit in *United States v. Musquiz*, 445 F.2d 963 (5th Cir. 1971).

V

Evidence That A Plane Laden With Contraband Was First Sighted Over Forty Miles North Of The Mexican Border Is Insufficient To Establish Guilt Of Illegal Importation Beyond A Reasonable Doubt.

As Circuit Judge Holloway pointed out in his dissenting Opinion in *Mallow, Infra,* Appendix A, "the testimony relied on by the Government that the marijuana was imported from Mexico amounts to mere surmise. * * * The Government points to no evidence indicating that the plane had been in Mexico," *Mallow, Infra.* The plane in question was first sighted "at least forty miles north of the border," (RII 43). There was no other evidence of importation. This holding is in stark conflict with the holding of the Ninth Circuit in *United States v. Carrion,* 457 F.2d 200 (9th Cir. 1972) where even the presence of Mexican-made products in the plane were insufficient to prove importation as to a plane found in the United States.

CONCLUSION AND PRAYER

Wherefore, the above premises considered, the Petitioners pray that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned, attorney of record for Petitioners, WILLIAM JOHN MALLOW, ROBERT ALLEN BARBEAU and CHARLES EDWARD McCORD, hereby certifies as follows:

(a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

R. E. Thompson
United States Attorney
Post Office Box 607
Albuquerque, New Mexico 87103

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said R. E. Thompson, attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this ____ day of May, 1980.

JOSEPH (SIB) ABRAHAM, JR.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 78-1953
No. 78-1954
No. 78-1955

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM JOHN MALLOW,
ROBERT ALLEN BARBEAU and
CHARLES EDWARD McCORD,
Defendants-Appellants.

Appeal from the United States District Court for the
District of New Mexico
(D.C. # CRIM 78-63)

Filed: February 19, 1980

OPINION

Charles Louis Roberts, El Paso, Texas (Joseph (Sib) Abraham, Jr., with him on the brief), for Appellants William John Mallow and Charles Edward McCord.

Tom W. Lamm of Lamm & Schader, Boulder, Colorado (William P. Goldstein, of counsel), for Appellant Robert Allen Barbeau.

Richard J. Smith, Assistant United States Attorney, Albuquerque, New Mexico (R. E. Thompson, United States Attorney, and David N. Williams, Assistant United States Attorney, on the brief), for Appellee.

Before SETH, Chief Judge, HOLLOWAY and BARRETT, Circuit Judges.

SETH, Chief Judge.

The appellant in No. 78-1953, William John Mallow, the appellant in No. 78-1954, Charles Edward McCord, and the appellant in No. 78-1955, Robert Allen Barbeau, were charged together with John Parker Montgomery III in a two-count indictment. Count I was for possession of marijuana with intent to distribute (21 U.S.C. §841(a)(1) and 18 U.S.C. §2), and Count II for importation of 692 pounds of marijuana from Mexico (21 U.S.C. §952(a), 21 U.S.C. §960(a)(1), and 18 U.S.C. §2).

A hearing to suppress was held at which the Government witnesses described the initial radar contact with a plane near the Mexican border; the surveillance of the plane to a landing near Las Vegas, New Mexico; contact with a truck there; and further surveillance of the plane after its takeoff and its landing at Pueblo, Colorado with the arrest of the pilot Montgomery. The witnesses also described a roadblock near Las Vegas with the stop of a pickup truck; the observation by the officer of plastic bags in the back of the truck in a camper cover; the odor of marijuana; and the arrest of the three occupants of the truck. The transcript of this suppression hearing consists of about a hundred pages. The trial court ultimately denied the motion to suppress, and we hold that this ruling was proper.

The suppression hearing was held on April 5th, and on April 20th, before a ruling had been made on the motions to suppress, all the defendants stipulated with the Government. This stipulation included the agreement that if there was an offense it took place on the date charged and in New Mexico. The parties also agreed that the substance charged was in fact marijuana, was a controlled substance, and the chain of custody of the marijuana was properly maintained. The stipulation also recited: "The Court may consider as evidence in this case the testimony adduced at the hearing on motions on April 5, 1978." The hearing referred to included the hearing on the motions to suppress.

The defendants at different times also filed waivers of jury trial. The waiver for defendants Mallow and McCord, after the express waiver of jury trial, recited that the Court "consider the testimony adduced at the hearing of April 5, 1978 as evidence," and continued, "The Defendants would further agree that the Court determine their guilt or innocence based on the evidence presented at said hearing."

The defendant Barbeau's waiver of jury trial after the waiver portion stated that he does "reaffirm that the Court may consider as evidence in this case the testimony adduced at the hearing on Motions on April 5, 1978."

Defendant Montgomery's waiver of jury trial was filed April 12th. This recited that the basis for the waiver was that this defendant had agreed with the prosecution "that the Court will determine his guilt or innocence to the charges in the indictment based upon the testimony given on April 5, 1978 at a hearing on Defendant's Motion to Suppress." The waiver also covered the points of agreement in the stipulation filed on April 20th.

Shortly after the stipulation, the defendant Montgomery filed on August 7th a memorandum with the trial court in which he argued that no in-court identification of him had been made, nor proof that he was the person arrested in Pueblo. In response, the trial court held an attorney's conference, referred to the identifi-

cation matter raised by defendant Montgomery, and set a "hearing on the merits." Defendant Montgomery was the only defendant who had expressly raised the issue, and the transcript is unclear as to whether the other cases were considered at the attorney's conference.

At the "hearing on the merits" on September 11th, there were appearances for each defendant. The "Montgomery case" was called and his attorney objected basically on the ground that the "trial" was over and this hearing was a "reopening" which was not contemplated by the stipulation. Reference was also made to the waiver of jury trial. The hearing proceeded and defendant Montgomery was duly identified in court by Government witnesses as the person arrested in Pueblo. This was the only defendant so identified and the Government "rested." The trial court had announced that Mr. Barbeau would be tried. The witnesses were not cross-examined by the attorneys for defendants Montgomery and Barbeau for the stated reason that they did not want to waive "any right." Also, the attorneys for these two announced that they would put on no witnesses. They both, however, had made objections during the questioning of witnesses by the Government based on purely evidentiary points and so participated. The local attorney for the other defendants was present but made no objection or statement. At the conclusion of this hearing the court announced that it found *each* of the defendants guilty on both counts.

It is apparent that the defendant Montgomery was pointed out in the courtroom as the person arrested in Pueblo when he got out of the plane. Thus a typical in-court identification took place as to him, but not as to the others. The other appellants, the Government asserts, were the persons arrested in a pickup truck at the roadblock near Las Vegas with the load of marijuana.

At the "hearing on the merits" referred to above, the waiver of jury trial was raised by defendant Montgomery as a matter related to the trial on "limited facts" by agreement. Of this the trial court said:

THE COURT: Well, you could have had a trial by jury, it wasn't my doings at all.

MR. HALE: That's correct.

THE COURT: Now, the time for trial is expired under the Speedy Trial Act and we just have to stay with what we have and if it's right, fine, if it isn't right—

MR. HALE: Just for the record, on behalf of Mr. Montgomery, we do object to the procedures and interject based upon the record that has been presently made.

Mr. Montgomery's attorney later objected further that judgment should be entered on the record already made, and objected to the "entire proceedings." Similar objections were made by the attorney for defendant Barbeau. There was no motion or other request by any party to withdraw the waiver of jury trial nor any stipulations contained therein, nor to withdraw from the general stipulation. We must regard this as significant, and was a position by Mr. Montgomery and Mr. Barbeau that the waiver was not rendered in any way invalid or ineffective as such. If the position was that it was conditioned on no further proceedings, it would have been expected, and it would have been necessary that a motion be made to withdraw the waiver for the objection to be effective. We find no action by the trial court contrary to the stipulation or waivers which would constitute reversible error. The stipulation was obviously permissive in the use of the suppression testimony. The defendant Montgomery raised the identification issue before guilt or innocence had been determined, and it was within the discretion of the trial court to hold the hearig it did.

As to the defendants other than Montgomery, the identification testimony at the suppression hearing was limited, but we must hold that it was adequate to identify the appellants as those persons arrested in the truck. It was obviously accepted as sufficient for the hearing. The witness James J. Montoya at the hearing

testified that he was the officer who was at the roadblock; that he had moved into place after being alerted that a vehicle had met a plane which had landed on a remote road and was moving in his direction. Almost immediately after being in position, he stopped a pickup with a camper top, observed the plastic bags, and smelled marijuana. He testified that he asked the driver for his driver's license, and examined it. He testified that the driver was Mr. Mallow. He also examined the driver's licenses of the two passengers whom he identified as Mr. McCord and Mr. Barbeau. He also testified that he arrested the three men, naming them, and stated: "From there we take [sic] the — Mr. McCord, Mr. Barbeau and Mr. Mallow to the district two office and took the truck to the district two office." Officer Montoya was cross-examined, and after telling about looking in the back of the truck he was asked by an attorney for two of the defendants:

Q. Later. Okay. After you got back from the back of the truck you placed the defendants under arrest, is that correct?

A. Yes, sir.

Q. And they were sent where?

A. They were taken to the district two office in Las Vegas.

The questions by the defense attorney as to when the defendants were arrested with the answer are suffi-

cient to demonstrate that the defendants were the persons arrested. There was nothing in the transcript to cast any doubt on the identity of the defendants so we have as the only evidence that which identified them. As indicated, the individuals were taken into custody as they arrived at the roadblock. It was an at-the-scene arrest with no opportunity for a mistake as to the selection of whom to arrest. It was the only vehicle stopped, it contained only the three men identified by their driver's licenses, and contained the marijuana. There was an adequate chain of custody of both the persons arrested and the marijuana.

As the case developed, there was no typical identification of the appellants in that a witness did not point a finger in the courtroom. This, under these circumstances, was not necessary as the identification in the hearing transcript was adequate under our decisions in United States v. Bishop, 534 F.2d 214 (10th Cir.), United States v. McCray, 468 F.2d 446 (10th Cir.), and Gravatt v. United States, 260 F.2d 498 (10th Cir.). These cases concern the problem of identification by name alone. In the *Gravatt* case we held that identity by name alone was not sufficient in a case involving a previous conviction. *United States v. McCray* also involved the identity of a person previously convicted. *United States v. Bishop* was a counterfeit case with an in-store identification, but no in-court identification by the clerk who received the bill. Again, in the case before us we have testimony as to an on-the-scene arrest which,

with the facts in the record, was sufficient to meet the burden placed on the prosecution.

We must also hold that the record demonstrates that the evidence was sufficient to support the conviction. We also find no merit in the objection of appellants as to the sufficiency of the evidence on the importation charge.

We have not heard the appeal of John Montgomery, and no opinion thereon is expressed. However, at the several hearings and conferences the attorneys for the defendants Mallow, Barbeau and McCord were all present. Also, on several occasions the four defendants were present. As the opinion indicates, often the attorneys for defendants other than Montgomery would adopt the position taken by him. Thus it was necessary in the above opinion to describe in detail the position taken by the defendant Montgomery on the several occasions. This has been done without passing on the merits of what is now the separate appeal of John Montgomery.

The judgments are affirmed as to defendants McCord, Barbeau and Mallow. The appeal of defendant Montgomery will be considered later.

Nos. 78-1953, 54 and 55
U.S.A. v. MALLOW, BARBEAU and McCORD

HOLLOWAY, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion on all points except the conclusion that there is no merit in the objection of appellants as to the sufficiency of the evidence on the importation charge.

The testimony relied on by the Government that the marijuana was imported from Mexico amounts to mere surmise. In fact, the Government makes the following concession in the same wording in the briefs as to all appellants (Brief of Appellee in No. 78-1955, 34-35; Brief of Appellee in Nos. 78-1953 and 1954, 21-22):

> With respect to Count II, it is conceded that the evidence of importation rests entirely from the fact that the Piper Cherokee Six was observed and tracked from a location near the border between the United States and the Republic of Mexico. A permissible inference from this fact is that the marijuana which was dropped at Las Vegas, New Mexico, originated at a location within the Republic of Mexico. As a consequence the evidence is sufficient to support a conviction on Count II.

The aircraft had first been picked up on the radarscope approximately 19 miles north-northwest of the Deming, New Mexico, Vortak. The Government points to no evidence indicating that the plane had been in Mexico.

To support a criminal conviction the evidence must do more than merely raise a suspicion of the facts sought to be proved; there must be more established than a mere suspicion of guilt. *Lewis v. United States*, 420 F.2d 1089 (10th Cir.); *Glover v. United States*, 306 F.2d 594, 595 (10th Cir.). I cannot agree that this evidence did more than justify a suspicion of importation and would accordingly reverse the convictions on count II.[1]

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1 In the circumstances of these cases I would decline the Government's suggestion that we not review the sufficiency of the evidence on the importation count under the concurrent sentence doctrine, which is discretionary. *See Barnes v. United States*, 412 U.S. 837, 848 n.16.

APPENDIX B

MARCH TERM — April 16, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 78-1953
No. 78-1954
No. 78-1955

versus

WILLIAM JOHN MALLOW,
CHARLES EDWARD MC CORD,
ROBERT ALLEN BARBEAU,
Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellants in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth and Circuit Judges Holloway and Barrett to whom the case was argued and submitted.

The petition for rehearing have [sic] been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

APPENDIX C

MARCH TERM — April 23, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 78-1953
versus No. 78-1954
No. 78-1955

WILLIAM JOHN MALLOW,
CHARLES EDWARD MC CORD,
ROBERT BARBEAU,
Defendants-Appellants.

The Court, in order to correct a clerical error in the issuance of its Order in the captioned appeal on April 16, herein, revises the second paragraph of said Order to read as follows:

"Upon consideration whereof, the Petition for Rehearing is denied. Circuit Judge Holloway voted to grant rehearing."

/s/ HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk